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IN THE

Supreme Court of the United States

October Term, 1967
No. 934

ROY MICHAEL FELTON, RALPH FRANKLIN MOORE, JAMES HOLLINGSHEAD, JOSEPH W. SPIRAKIS and RALPH JAMES ARMANTROUT,

Petitioners,

vs.

THE CITY OF PENSACOLA,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, First District, State of Florida.

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Petitioners,

vs.

THE CITY OF PENSACOLA,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, First District, State of Florida.

Petitioners pray that a writ of certiorari issue to review the judgment of the District Court of Appeal, First District, State of Florida, entered in the above entitled case on July 28, 1967.

Opinions Below.

The actions against petitioners were jointly tried in the Municipal Court of the City of Pensacola, State of Florida, before the Honorable W. D. Richbourg, a Judge of said Court. No written opinion was rendered by the trial judge.

The judgments of conviction were affirmed by The Circuit Court of Escambia County, State of Florida. The opinion of the Court by the Honorable Woodrow M. Melvin [R. 75-78][1] is attached as Appendix A hereto. The said opinion is unreported.

The judgment of the Circuit Court of Escambia County as aforestated was affirmed by the District Court of Appeal, First District, State of Florida. The opinion of the District Court of Appeal by the Honorable Donald Carroll [R. R-CC] is attached as Appendix B hereto. Said opinion is reported in 200 So. 2d 842. A due and timely petition for rehearing was denied by the said District Court of Appeal without opinion.

No written opinion was rendered by the Supreme Court of Florida denying a petition for writ of certiorari.

Jurisdiction.

The judgment of the court below [R. Q] dated July 27, 1967 and entered on July 28, 1967 is attached as Appendix C hereto. A due and timely petition for rehearing [R. K-P] was denied on July 27, 1967 [R. J]. A due and timely petition for a writ of certiorari to the Supreme Court of Florida [R. B-I] was denied by order dated September 29, 1967, and entered on October 18, 1967 [R. A]. By reason of the aforesaid, the District Court of Appeal, First District, State of Florida, became the highest court of the State in which a decision could be had. *Tralins v. Gerstein,* 378 U.S. 576; *Smith*

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[1]The reference "R" is to the certified transcript. The proceedings in the Florida Supreme Court and District Court of Appeal are lettered "A"-"CC". The proceedings in the Circuit Court of Escambia County and the trial court are numbered 1-83.

v. California, 361 U.S. 147, 148, n.2; *Virginia Ry. Co. v. Mullins,* 271 U.S. 220, 222. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented.

1. Whether, consistent with the free speech and press provisions of the First Amendment and the due process requirements of the Fourteenth Amendment, as well as the constitutional standards for judging obscenity enunciated by decisions of the Supreme Court, the publications involved in the prosecution herein upon which the judgments of conviction were rendered are entitled to constitutional protection?

2. Whether §20-36 of the Ordinances of the City of Pensacola, on its face and as construed and applied to the publications involved in the prosecution herein upon which the judgments of conviction were rendered, abridges freedoms of speech and press and arbitrarily deprives persons, including petitioners, of liberty without due process of law contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments?

3. Whether §20-36 of the Ordinances of the City of Pensacola, as construed and applied herein to authorize convictions of petitioners without proof in the record that petitioners knew the contents of the publications herein involved or knew that the contents of the said publications were obscene, deprives petitioners of their liberty without due process of law and abridges the exercise of freedoms of speech and press, contrary to the free speech and press and due process of law provisions of the First and Fourteenth Amendment?

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States; the provisions of §20-36 of the Ordinances of the City of Pensacola; and the pertinent provisions of the Florida obscenity statute [FSA 847.011 (Laws 1961, C. 61-7, §§1-11)] are attached as Appendix D hereto.

Statement of the Case.

Each of the petitioners was charged with a violation of §20-36 of the Ordinances of the City of Pensacola, to wit, the exposure and sale of obscene publications [R. 17, 23A, 29, 36 and 43]. The cause came on for trial before the Honorable W. D. Richbourg, a Judge of the Municipal Court of the City of Pensacola, State of Florida [R. 45].

The cases were tried jointly, and the first case to be tried involved the petitioner Roy Michael Felton. A police officer testified [R. 47] that on September 20, 1965 he went to petitioner Felton's establishment [R. 47-48]. The officer arrested petitioner Felton because "he was selling nudist magazines" [R. 49]. In the officer's opinion, the magazines were "obscene" [R. 49-50]. The officer testified that the magazines were open to the public view and that some of them were stapled together [R. 50]. The officer purchased one magazine and then seized the rest of them [R. 50]. The magazine was sold to the police officer by petitioner Felton's wife while said petitioner was in the store [R. 51].

On cross-examination, the police officer testified that he had been told by the Chief of Police that "if they had this sort of literature up there to purchase

or take some of this literature" [R. 51]. In reply to the question as to what criteria the police officer had used in determining whether or not a particular magazine violated the law, the witness replied: "I used no test, sir; I just used my own good judgment that nude women and men in a magazine together would be a violation of the law" [R. 52].

The police officer was asked whether he had any knowledge of whether or not petitioner Felton had any knowledge of the contents of the magazines. The witness replied: "No actual proof, no, sir" [R.52].

As against petitioner Felton, there were offered twelve magazines which had been either purchased or seized at the establishment. These were entitled: "Sun Era", Vol. 2, No. 7, Fall 1965; "Jaybird Safari", Vol. 1, No. 1; "Nudist Newsfront", July 1965; "The Nudist Idea", Vol. 1, No. 2; "Today's Nudist", Vol. 1, No. 7," Dynamic Nudist", Vol. 1, No. 7; "New Dawn", a Journal of Contemporary Nudism; "American Nudist", Vol. 17, Fall Issue; "Nudist Pictorial", No. 3, 1965; "Nudist News", Vol. 2, No. 2; "Universal Nudists"; Vol. 1, No. 2; "Sun Circuit", Vol. 1 [Peo.'s Ex. C; R. 46, 56].

This was the entire case against petitioner Felton.

In reply to an inquiry by the Court, the prosecutor stated that the same evidence, except with different police officers and with a slight difference in the actual issues of certain magazines, would apply to all the other petitioners [R. 54]. It was thereupon stipulated between counsel that the evidence that was presented in the case of petitioner Felton would be the same as against other petitioners [R. 54]. It was also stipulated on behalf of the other petitioners that

they were all arrested on the same day, to wit, September 20, 1965, at their various establishments; that the various magazines were offered for sale at the different establishments; that the establishments were in the City of Pensacola; and that the magazines were exposed for sale to the public [R. 54-59].

As against the petitioner Moore, the following magazines were offered into evidence: "Nude Lark", No. 10; Ortil, "A Hundred Naked Rebels"; "Solis"; "Review International", Nos, 1 and 2; and "Arcadia", No. 4 [Peo.'s Ex. B; R. 56].

As to petitioner Hollingshead and his clerk, petitioner Armantrout, the People offered the following exhibits: "Urban Nudist", Vol. 3, No. 1; "Jaybird Journal", Vol. 1, No. 1; "Sun Era", Vol. 2, No. 7; "Teenage Nudist", Vol. 1, No. 8; "Sundial", Vol. 4, Nos. 1 and 2 [Peo.'s Ex. A; R. 56-57].

As to petitioner Spirakis, the following magazines were offered into evidence: "Nudist Sun", Vol. 2, No. 1; "Nudist Newsfront", Vol. 2, No. 3; "Continental Nudist", Vol. 2, No. 4; "Nude Lark", No. 10; "Sundial", Vol. 4, No. 2; "Nudist Week", No. 4; "Nudist News", Vol. 2, No. 2; "Sun Circuit", Vol. 1; and "Nudifacts", Vol. 1, No. 1 [Peo.'s Ex. D; R. 57-58].

On behalf of each of the petitioners, there was a motion for directed verdict of acquittal [R. 59-64] which was overuled [R. 64.] The trial court stated: "Having glanced through the magazines from every stand this morning, I see that to me they are obscene. To me they have a mixture of the races, both male and female" [R. 69]. All of the petitioners were found guilty. Each was fined the sum of $350.00 and

costs, except the petitioner Armantrout, who was fined $100.00 and costs [R. 70].

How Federal Questions Are Presented.

On behalf of each petitioner, there was a motion for directed verdict of acquittal at the conclusion of the trial [R. 59]. Among the grounds urged for the directed verdict of acquittal was that the magazines involved in the prosecutions were not obscene under the free speech and press decisions of the United States Supreme Court [R. 59-63], and that there was a complete absence of any proof of guilty knowledge or scienter on the part of these petitioners [R. 63-64].

On appeal to the Circuit Court in and for Escambia County, State of Florida, it was urged on behalf of each of the petitioners that §20-36 of the Ordinances of the City of Pensacola as applied to the petitioners was unconstitutional in violation of the provisions of the United States Constitution and the Declaration of Rights of the Florida Constitution; that there was no proof of knowledge or scienter and that the trial court had erred in finding that the material in question was obscene [R. 13, 20, 25, 32 and 39].

The opinion rendered by the Circuit Court [Appendix A, R. 75-78] stated, among other things, that the trial judge was correct in his decision in holding that the material was obscene under the test of obscenity as set forth in *Roth v. United States,* 354 U.S. 476 [R. 76]; that the trial judge could measure the magazines by what he determined to be "the common conscience of the community" [R. 77] and that "the constitutional guarantees relative to freedom of speech or freedom of the press" were not intended to protect the

magazines herein [R. 77]. The Circuit Court also held that the evidence was sufficient to justify a holding that petitioners were chargeable with circumstantial knowledge of the "contents" of the magazines [R. 77-78].

On appeal to the District Court of Appeal, First District, State of Florida, petitioners again urged, among other grounds, that the material involved was not obscene and that there was a failure of proof of guilty knowledge and scienter [R. 80-81].

Treating the appeal as a duly presented petition for certiorari under the Florida statutes (Appendix B), the District Court of Appeal, in affirming the convictions, held that the magazines were obscene and not within the guarantees of "freedoms of speech and press as secured by the First Amendment to the U.S. Constitution" [R. X]. The Court found the points raised with respect to scienter "to lack substantial merit" [R. CC].

On petition for a writ of certiorari filed with the Supreme Court of Florida, petitioners again raised, among other things, the nonobscenity of the magazines involved and the failure to meet the constitutional requirement of scienter [R. D-E].

Reasons for Granting the Writ.

1. In the constitutional sense, the magazines involved in the prosecutions herein are neither obscene nor otherwise unlawful. The judgments of conviction based upon the aforesaid magazines result in an unconstitutional application of the Pensacola Ordinance, contrary to the express guarantees of the free speech and press

and due process provisions of the First and Fourteenth Amendments.

There was no attempt made by the prosecution to prove that these magazines, or any of them, substantially exceed contemporary standards in the depiction or representation of sex and nudity; or appeal to a prurient interest; or are utterly without social importance. The magazines herein are comparable in their description of sex and nudity to those magazines which have been found not to exceed the limits of candor, in the Nation as a whole, or to have social importance, justifying their protection under the First Amendment.

So far as the standards and criteria for judging obscenity within constitutional limitations are involved, there is no significant difference between the magazines herein and the material deemed constitutionally protected in the cases decided by this Court on May 8, June 12, October 23 and November 6, 1967. See, *Austin v. Kentucky*, 386 U.S. 767 (magazines entitled "Spree", No. 38, and "High Heels", Vol. 2, No. 6); *Gent v. Arkansas*, 386 U.S. 767 (magazines entitled "Gent", "Swank", "Bachelor", "Ace", "Calvacade", "Gentleman" and ""Sir"); *Rosenbloom v. Virginia*, 388 U.S. 450 ("Solis", a magazine printed in German, and also 107 other nudist magazines); *Ratner v. California*, 388 U.S. 442 (motion picture film "Honey Bee"); *Cobert v. New York*, 388 U.S. 443 (motion picture films "Jane Palmer No. 2", "M. Jordan" and "Jayne Tracy"); *Schackman v. California*, 388 U.S. 454 (girlie pictures in coin operated peep shows: D-15; O-12, O-7, B-1 and B-19); *Central Magazine Sales, Ltd. v. United States*, 88 S. Ct. 235 (girlie magazine "Exclusive", and nudist magazines "International Nud-

ist Sun", No. 16, and "Review International", No. 6); *Potomac News Co. v. United States*, 88 S. Ct. 233 (male nudist magazine "Hellenic Sun Number Two"); *Connor v. City of Hammond*, 88 S. Ct. 234 ("girlie" magazines); and *Chance v. California*, 88 S. Ct. 253 (nude pictures). See also, *Sunshine Book Co. v. Summerfield*, 355 U.S. 372; *Times Film Corp. v. Chicago*, 355 U.S. 35; *One, Inc. v. Olesen*, 355 U.S. 371; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Jacobellis v. Ohio*, 378 U.S. 184.[2]

The case herein does not involve a statute which reflects a "specific and limited state concern for juveniles", nor does the case involve any "assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it", nor was there any evidence in the case herein of the sort of "pandering" which the

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[2]See, *Grove Press v. Gerstein*, 378 U.S. 577 (*Tropic of Cancer*); *Tralins v. Gerstein*, 378 U.S. 576 (*Pleasure Was My Business*); *Memoirs v. Massachusetts*, 383 U.S. 413 (*Fanny Hill*); *Redrup v. New York*, 386 U.S. 767 (*Lust Pool* and *Shame Agent*); *Aday v. United States*, 388 U.S. 447 (*Sex Life of a Cop*); *Books, Inc. v. United States*, 388 U.S. 449 (*Lust Job*); *Quantity of Copies of Books v. Kansas*, 388 U.S. 452 (*Sin Hooked, Bayou Sinners, Lust Hungry, Shame Shop, Fleshpot, Sinners Seance, Passion Priestess, Penthouse Pagans, Shame Market, Sin Warden* and *Flesh Avenger*); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (*Sin Whisper*); *Keney v. New York*, 388 U.S. 440 (*Sin Servant, Lust School* and *Lust Web*); *Mazes v. Ohio*, 388 U.S. 453 (*Orgy Club*); *Friedman v. New York*, 388 U.S. 441 (publications entitled "Bondage Boarding School", "English Spanking School", "Bound and Spanked", "Sweeter Gwen", "Travelling Saleslady Gets Spanked", "Bound to Please", "Bizarre Summer Rivalry", "Heat Wave" and "Escape Into Bondage Book No. 2"); *Sheperd v. New York*, 388 U.S. 444 (sets of photographs and the following publications: "Promenade Bondage", "Spanking Nurses", "Spanking Sisters" and "Bondage"); and *Avansino v. New York*, 388 U.S. 446 (packets of photographs and the publication entitled "Promenade Bondage Vol. 4".

Court found significant in *Ginzburg v. United States.* See, *Redrup v. New York,* 386 U.S. 767. As the record reveals, police officers simply went to the various establishments of the petitioners and purchased or seized materials because, in the subjective determination of the police officers, the magazines were deemed "obscene". It was admitted by the sole prosecution witness that he had "no actual proof" of scienter on the part of any petitioner and there was no proof of any statement or conduct on the part of any of the petitioners which could be construed as "pandering" or appeal to the prurient interest. The record is simply barren of any such evidence. The portrayals of the nudes contained in these magazines are well within customary limits of candor in the description or representation of sex or nudity. The magazines are not utterly without social importance. The magazines deal with various aspects of nudism and naturist living and emphasize the benefits which come from nudist living and the acceptance of the unclothed human body in our culture.

Moreover, it should be noted that comparable issues of the magazine "Solis" [Peo.'s Ex. B] and the magazines "Review International" [Peo.'s Ex. B], were held entitled to constitutional protection in *Rosenbloom v. Virgina;* 388 U.S. 450; and *Central Magazine Sales, Ltd. v. United States,* 88 S. Ct. 235.

In view of the record herein and the decisions of this Court, it is submitted the judgments of conviction rendered herein cannot stand in the light of the protective provisions of the First and Fourteenth Amendments.

2. The record is barren of any proof of scienter on the part of petitioners. The record stands uncontradicted that the petitioners had no knowledge of the

contents of the magazines and it is equally clear that petitioners had no reason to believe that the magazines were obscene or otherwise unlawful. The sole prosecution witness, a police officer, testified that he had no proof of guilty knowledge, and his only statement was that some of the magazines were stapled. Thus, without any evidence other than the illegally seized magazines (Appendices A and B), the courts below concluded that petitioners could be charged with unlawful knowledge under an Ordinance which eliminates entirely any requirement of scienter. See, *Smith v. California*, 361 U.S. 147.

The convictions under the obscenity Ordinance herein, as construed and applied to petitioners to justify their convictions without the slightest proof of scienter, violate the free speech and press and due process provisions of the First and Fourteenth Amendments. Under the governing standards elucidated in the opinions of this Court, the State manifestly failed to meet the strict burden of proof imposed upon the State under the Constitution when First Amendment rights are involved. *New York Times Co. v. Sullivan*, 376 U.S. 254; *Garrison v. Louisiana*, 379 U.S. 64; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Schneiderman v. United States*, 320 U.S. 118; *Baumgartner v. United States*, 322 U.S. 665; *Hartzel v. United States*, 322 U.S. 680. See also, *Thompson v. Louisville*, 362 U.S. 199, 206, n.13.

Conclusion.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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